# Petition

81-869

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL KALMANOVITZ,

Petitioner,

vs

FERDINAND J. GUTTING, JAMES C. McCLELLAN, ALVIN GRIESEDIECK, JR., JOSEPH GRIESEDIECK: EDWARD J. GRIESEDIECK, JR.; WILLIAM S. LOWE; MONTE E. SHOMAKER; and J. HOWARD WEMHOENER,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

I.

WHAT IS THE CORRECT METHOD OF DETERMINING THE VALUE OF STOCK PURCHASED BY A DEFRAUDED BUYER UNDER RULE 10b-5?

II.

DOES RULE 10b-5 PROVIDE A DEFRAUDED PURCHASER THE RIGHT TO RECOVER CONSEQUENTIAL DAMAGES?

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## STATUTORY PROVISIONS INVOLVED

15 U.S.C. §78j(b)

Rule 10b-5, 17 C.F.R. §240.10b-5

## PARTIES TO PROCEEDINGS IN THE COURT BELOW

The caption of this case contains the names of all parties to the proceeding herein. The other original defendants listed in the caption of the District Court's opinion either settled their cases or were dismissed. The parties reflected in the caption were the only parties interested in the appeal before the United States Court of Appeals for the Ninth Circuit and the proceeding before this Court.

## TABLE OF AUTHORITIES


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| Adickes v. Kress & Co., 398 U.S. 144, 157 (1970). | 9 |
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15 U.S.C. §78j(b) 1,5

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## OTHER AUTHORITIES


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| Measuring Buyers Damages in 10b-5 Cases 31 Business Lawyer 1839 (1976) | 6 |
| Georgetown Law Journal, 1093 1144 (1977) | 11 |
| Restatment of Torts (Second) 549 (1)(b). | 11 |

## OPINIONS BELOW

The District Court's opinion and the opinion of the Ninth Circuit are reproduced in full in the appendix filed herein.

## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 10, 1981. The Court of Appeals denied a Petition for Rehearing or Rehearing En Banc on August 5, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. §1251(1).

IN THE

SUPREME COURT OF THE UNITED STATES

---

PAUL KALMANOVITZ,

Petitioner,

vs

FERDINAND J. GUTTING, JAMES C. McCLELLAN, ALVIN GRIESEDIECK, JR., JOSEPH GRIESEDIECK: EDWARD J. GRIESEDIECK, JR.; WILLIAM S. LOWE; MONTE E. SHOMAKER; and J. HOWARD WEMHOENER,

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PETITION FOR WRIT OF CERTIORARI
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## STATEMENT OF THE CASE

Plaintiff below, Paul Kalmanovitz, hereinafter "Kalmanovitz" filed a complaint in the United States District Court for the Northern District of California against the former officers and directors of Falstaff Brewing Corporation and others. The suit asserted a cause of action for common law fraud and for violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) and Rule 10b-5, 17 C.F.R. §240.10b-5. The basic allegations contained in the Complaint were that Kalmanovitz was defrauded in connection with his purchase of 100,000 shares of Falstaff Brewing Company stock.

The complaint alleged a conspiracy between the various lending institutions (the banks and insurance companies),

accountants and former directors and officers of Falstaff. The object of the conspiracy was to obtain a substantial equity investor in Falstaff Brewing Corporation who would contribute enough capital to keep the corporation out of bankruptcy until the lending institutions' security interest became perfected. The Complaint further alleged that as a result of the aforementioned conspiracy, Kalmanovitz was fraudulently induced to to invest Ten Million Dollars in Falstaff by purchasing 100,000 shares of preferred Falstaff stock and further was induced to guarantee up to Ten Million Dollars of Falstaff's accounts payable.

In his Complaint, Kalmanovitz alleged that as a result of the misrepresentations and schemes perpetrated by the defendants and others,

Kalmanovitz "was damaged thereby in that at the time of his purchase, the consideration he received was substantially less than that which he gave . . .". The Complaint then set forth eleven areas in which the damages were specified. Kalmanovitz then prayed for compensatory damages, "in a sum calculated based on the difference between the consideration given by plaintiff and that which he received which he believes to be in excess of Five Million Dollars, for interest on said sum at the rate of seven percent per annum, commencing April, 1975, through the present. . .".

The record in the case revealed that Kalmanovitz purchased the Falstaff stock at a price of $100.00 per share in April, 1975. In March of 1975, Kalmanovitz advanced Three Million Dollars of the

agreed price and thereafter paid the remaining Seven Million Dollars on April 28, 1975. The final payment consisted in part of a Five Million Dollar loan which Kalmanovitz had procurred from City National Bank in Beverly Hills, California. The defendants thereafter filed a motion for summary judgment contending that the record showed that Kalmanovitz bought the stock for $100.00 per share and that within a few months thereafter, he sold it to the second purchasers at the same price. They argued that this showed that there were no damages suffered by Kalmanovitz and that they were entitled to judgment as a matter of law. The Court thereafter granted the motion for summary judgment on the sole ground that plaintiff suffered no damages. The Ninth Circuit Court of Appeals without elaboration

followed the District Court's finding that there were no damages suffered by plaintiff.

## REASONS FOR GRANTING THE WRIT

### I.

### WHAT IS THE CORRECT METHOD OF DETERMINING THE VALUE OF STOCK PURCHASED BY A DEFRAUDED BUYER UNDER RULE 10b-5?

There is very little question today that the prevailing measure of damages in the federal courts under Section 10b of the Securities Act of 1934, 15 U.S.C. §78(j)(b) and Rule 10b-5, is the difference between the purchase price and

the value of the stock at the date of purchase. Green v. Occidental Petroleum Corp., 541 F. 2d 1335, 1344 (9th. Cir. 1976), concurring opinion; Blackie v. Barrick, 524 F. 2d 891, 909 (9th. Cir. 1975) cert. den. 429 U.S. 816 (1976); Sacket v. Beaman, 399 F. 2d 884, 891 (9th. Cir. 1968).

Cases from other circuits have applied the identical rule. Wolf v. Frank, 477 F. 2d 467 (5th. Cir. 1973) cert. den. 414 U.S. 975, rehearing den. 414 U.S. 1104 (1974); Kohler v. Kohler, 208 F. Supp. 808 (D.C. Wis. 1962), aff'd. 319 F. 2d 334 (7th. Cir. 1963); Ehrler v. Kellwood Co., 391 F. Supp. 927 (D.C. Mo. 1975), aff'd. 521 F. 2d 1347 (8th. Cir. 1975). See also, Measuring Buyers Damages in 10b-5 Cases, 31 Business Lawyer 1839 (1976).

This remedy has provided that

"damages under what may be called an out of pocket rule, and namely the difference between the real value of the property purchased at the date of its sale and the price paid for it, together with interest and associated outlays by the purchaser". Sacket, supra at 891.

This remedy and measure of damages was borrowed from the early case of Sigafus v. Porter, 179 U.S. 116 125 (1900) and has consistently been applied toward damages to a defrauded purchaser of securities coming within the coverage of Section 10b and Rule 10b-5.

In the case below, the only evidence of the value of the Falstaff securities purchased by Kalmanovitz on the date of sale was the reasoning of the Court, without factual support, that a later sale as a matter of law fixed the value of stock as of the date of purchase.

There was not anything in the record to support this and it clearly was a misapplication of the law. For the court to have declared as a matter of law that the value of the stock on the date of purchase was to be determined by the sale price some months later denied Kalmanovitz his right to a trial. The fair market value of the stock as of the date of purchase is perhaps the most classic example of a legal fact which can only be subjectively determined. Subjective determination like opinions cannot be shown to be true as a matter of law and thus cannot sustain motions to dismiss or motions for summary judgment. Depinto v. Providence Security Life Ins. Co., 274 F. 2d 50, 55 (9th. Cir. 1967) cert. den. 389 U.S. 822 (1968). In this instance, it is clear that summary judgment was not properly granted since

there was a material fact issue in dispute and the court was not able to grant judgment as a matter of law upon the record before it. Adickes v. Kress & Co., 398 U.S. 144, 157 (1970).

Under no circumstances has any court ever abandoned the "out of pocket" or "date of sale" rule to defeat the claim of a defendant for damages. For the district court below and the Ninth Circuit Court of Appeals to do this results in a clear violation of the teachings of this Court as well as the dictates of Congress. This Court in Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972), stated,

> "[C]ongress intended securities legislation enacted for the purpose of avoiding frauds to be construed not technically and restrictively but flexibly to effectuate its remedial purpose."

For the courts below to ignore the "out of pocket" measure of damages and apply a measure of damages that denies plaintiff relief is both contrary to the law of the many courts of appeals that have decided the question and contrary to the legislative interest embodied in the securities laws. This Court should issue its Writ of Certiorari to the Ninth Circuit Court of Appeals to review the issues contained in this matter to examine the application of the law by the Ninth Circuit as it relates to the interpretation of the Congressional intent embodied in the securities law.

II.

DOES RULE 10b-5 PROVIDE A DEFRAUDED PURCHASER THE RIGHT TO RECOVER CONSEQUENTIAL DAMAGES?

In addition to out of pocket damages the law is well established that the defrauded buyer is entitled to recover "consequential damages". Foster v. Financial Technology, Inc., 517 F. 2d 1068 (9th. Cir. 1975); Madigan, Inc. v. Goodwin, 498 F. 2d 233 (7th. Cir. 1974); Zeller v. Bogue Electric Mfg. Corp., 476 F. 2d 795 (2nd. Cir. 1973); cert. den. 414 U.S. 908 (1973); Estate Counseling Service, Inc. v. Merrill Lynch Pierce Fenner & Smith, Inc., 303 F. 2d 527 (10th. Cir. 1962); Accord Restatement of Torts (Second) 549 (1)(b).

In fact, several circuits have allowed the award of consequential damages even if the plaintiff can show no general damages. Madigan, supra, at 236; Zeller, supra at 803. See also, Rule 10b-5 Damages, 65 Georgetown Law Journal, 1093, 1144 (1977). In the instant case,

the district court denied any recovery to Kalmanovitz and granted summary judgment thereby dismissing the whole case. It was clear that under the law then prevailing, Kalmanovitz was entitled to recover consequential damages even if, as the Court found, he suffered no actual damages. The law in the various circuits supports this right of recovery; however, it was ignored by the Ninth Circuit Court of Appeals. The decision by the Ninth Circuit is directly contrary to the decision of the Seventh Circuit in Madigan, Inc. v. Goodman, 498 F. 2d 233 (7th. Cir. 1974). In that case the court stated that if plaintiff could show that but for the fraud perpetrated he would not have expended the money but would have placed the purchase price in a savings account, he was entitled to recover the loss of interest. The

decision of the Ninth Circuit below is also in conflict with the case of Foster v. Financial Technology, Inc., 517 F. 2d 1068 (9th. Cir. 1975). In that case the Ninth Circuit reversed the district court's summary judgment for defendants. The Ninth Circuit remanded the cause to allow for determination of the extent, if any, of plaintiff's consequential damages incurred. The Foster case makes specific reference to the determination of the "opportunity lost" damages. These "opportunity lost" damages are those which are incurred where because of the 10b-5 violation, the plaintiff has "lost the extra profits it would have earned had it reinvested its excess funds in its own operation instead of using them to purchase securities from the defendant." Foster, supra, at 72.

The Tenth Circuit in Estate

Counseling Services, Inc., supra, provided for the recovery of such consequential damages as the loss of interest and any other outlay legitimately attributable to the defendant's fraudulent conduct. Supra at 533. These decisions are consistent with the decisions in the other circuits. See Garnatz v. Stifel Nicolaus & Co., Inc., 559 F. 2d 1357, 1360 (8th. Cir. 1977). Nickels v. Koehler Management Corp., 541 F. 2d 611 (6th. Cir. 1976).

In the instant case, the Ninth Circuit's decision had the effect of denying Kalmanovitz his entire remedy as provided by the cases interpreting Rule 10b-5. The Ninth Circuit in affirming the granting of summary judgment has in effect stripped Kalmanovitz of his right to recover for his losses incurred due to the fraud of the defendants in violation

of Rule 10b-5. As the district court found, Kalmanovitz expended in excess of $100,000.00 in interest on a loan which he incurred as a part of the purchase price. But for the fraud of the defendants, Kalmanovitz would not have incurred this expenditure and as such, he should have been allowed to seek its recovery in a court of law. Additionally, the court foreclosed Kalmanovitz from recovering the loss of extra profits he could have earned had he reinvested the funds used in the purchase in his own operation instead of using them to purchase the securities from the defendants.

It is disturbing to note that the Ninth Circuit has ignored the case law emanating out of the other circuits and has foreclosed a plaintiff from recovery in circumstances where it is clear he has

suffered a loss due to the fraud of defendants in violation of Rule 10b-5. This Court should issue its Writ of Certiorari to the Ninth Circuit Court of Appeals to examine the decision rendered below. It is clear that the decision rendered by the Ninth Circuit conflicts with the decisions emanating out of the courts of appeals of other circuits and as such, this is the proper vehicle for the court to examine the type of damages recoverable under Rule 10b-5.

## CONCLUSION

For the reasons stated above and the authorities cited therein, this Court should issue its Writ of Certiorari to the Ninth Circuit to review the decision rendered therein. The decision not only conflicts with the case law of other

circuits but concerns an item of importance, to-wit: the recovery of damages for the violation of Rule 10b-5.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

The undersigned certifies that two complete copies of petitioner's Petition for Writ of Certiorari and Appendix thereto was served on the attorneys of record for respondents by placing same in the United States Mail with first class postage thereon fully prepaid at Clayton, Missouri, on the 3rd day of November, 1981, addressed as follows:

Messrs. Robert E. Gooding, Jr.
and Jay M. Spears
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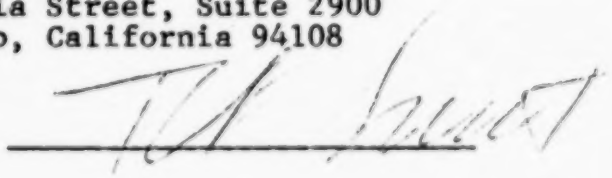

# Appendix

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Respondents.

# APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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UNITED STATES DISTRICT COURT

FOR THE NINTH CIRCUIT

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|---|---|
| PAUL KALMANOVITZ,<br><br>Plaintiff-Appellant,<br><br>vs<br><br>FERDINAND J. GUTTING, et. al.,<br><br>Defendant-Appellee | No. 804106<br><br>ORDER |

Before: PREGERSON, NELSON, and REINHARDT, Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Dated: August 5, 1981

UNITED STATES DISTRICT COURT

FOR THE NINTH CIRCUIT

| | |
|---|---|
| PAUL KALMANOVITZ,<br><br>Plaintiff-Appellant,<br><br>vs<br><br>FERDINAND J. GUTTING, et. al.,<br><br>Defendant-Appellee | No. 804106<br><br>D.C. Nos. 76-0106-CFP 77-0611-CFP<br><br>MEMORANDUM |

Appeal from the United States District Court for the Northern District of California, Cecil F. Poole, District Judge, Presiding, Argued and Submitted on June 1, 1981

Before: PREGERSON, NELSON, and REINHARDT, Circuit Judges

In this 10b-5 action, the district court correctly concluded that a genuine

issue of material fact did not exist as to the value of the stock on the date appellant purchased it. The court did not err in ruling, as a matter of law, that appellant suffered no damages since he bought the stock and arranged to sell it two months after the purchase at the same price --$100.00 per share. See Blackie v. Barrack, 524 F. 2d 891, 909 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976); Arrington v. Merrill Lynch, Pierce, Fenner and Smith, Inc., No. 77-3911, slip op. 809, 815 (9th. Cir. Nov. 3, 1980).

Therefore, we AFFIRM.

June 10, 1981

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| PAUL KALMANOVITZ,<br><br>Plaintiff,<br><br>vs<br><br>NEW YORK LIFE INSURANCE COMPANY, a New York Corporation, THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a New York Corporation; HASKINS & SELLS, a Partnership, FERDINAND J. GUTTING, aka FERD GUTTING; HARVEY A.A. BEFFA, SR.; JAMES C. McCLELLAN, Esq.; ALVIN GRIESEDIECK, JR.; JOSEPH GRIESEDIECK; EDWARD J. GRIESEDIECK, JR.; HARVEY A.A. BEFFA, JR.; WILLIAM S. LOWE; MONTE E. SHOMAKER; J. HOWARD WEMHOENER; WILLIAM J. HEALY; and JOHN C. CALHOUN,<br><br>Defendants. | C 76-106 CFP<br><br>[Formerly MDL No. 263 No. 77-611C (2)]<br><br>ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT |

Plaintiff brings this suit asserting causes of action for common law fraud and for violation of §10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. §78j(b) and Rule 10b-5 17 C.F.R. §240.10b-5. He alleges that he was defrauded in connection with his purchase of 100,000 shares of Falstaff Brewing Company. The only defendants remaining in the case, former officers and directors of Falstaff, have moved for summary judgment, inter alia, on the ground that plaintiff suffered no damage as a result of the alleged fraud.

BACKGROUND OF THIS MOTION

On or about March 10, 1975, plaintiff Kalmanovitz and Falstaff negotiated a written agreement under which Falstaff was to issue 100,000 shares of a new class of preferred

stock for which plaintiff agreed to pay $10 million. The transaction was subject to ratification by Falstaff's shareholders at their annual meeting on April 28. On March 20, plaintiff advanced $3 million of the agreed price; he paid the remaining $7 million on April 28 after the shareholders had voted to ratify. [1] The final payment consisted in part of a $5 million loan which plaintiff had procured from City National Bank in Beverly Hills, California.

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1 These transactions and others forming the basis of this extended litigation have been the subject of numerous court decisions and orders. See, for example, the Court's Memorandum and Order in this action, dated February 3, 1977, granting and denying summary judgment, and the Court's Opinion in Falstaff Brewing Co. v. New York Life Insurance Co., et. al., No. C 76-1560, March 3, 1978, granting summary judgment.

The record in this case revealed that plaintiff purchased the Falstaff stock at a price of $100 per share in April of 1975. A few months later, he sold the stock at the same price per share to two companies which he controlled, General Brewing Corporation (General) and S & P Corporation (S & P). The transaction was not accomplished instantaneously, but each company eventually received 50,000 shares in return for a total investment of $5 million.

Plaintiff's theory during the course of this litigation had been that in April 1975, Falstaff's assets were over-valued by $5 million, and that the preferred shares consequently were worth something less than their stated value when he bought them. By the time he sold the shares to General and S & P

he asserts his personal efforts to rescue Falstaff from its financial doldrums had effected marked improvement in that company's financial condition and, as a result, the value of the shares had increased. Thus, the theory continued, the shares were indeed actually worth the full $100 when plaintiff sold them to General and S & P, but the crucial issue was their true value at the time he purchased them from Falstaff. [2]

Defendants, on the other hand, contend that this effort to explain the lack of any change in valuation of the

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2 The record furnishes no support for the position that the shares appreciated in value during this period. It is precisely this void which triggered plaintiff's change of position hereinafter set forth.

stock is sheer speculation. Their position is that since plaintiff got the full amount of his purchase price, and since he, himself, valued the shares at $100 each within a few months of his purchase, he suffered no damages and thus has no cause of action.

A hearing on defendants' motion for summary judgment was held on August 24, 1979. The moving and responding papers failed to set forth sufficient details of the transactions between plaintiff and his two companies whereby the shares were transferred to them. The record at the hearing disclosed little more than that the first payment on the loan at City National Bank was made July 2, 1975, and that the shares were formally transferred to General and S & P in November, 1976. The facts were unclear as to when and how, and by

what method of valuation, the resale had been accomplished.

Plaintiff's counsel, Mr. Switzer, argued that the mere evidence that the price of the shares at the time plaintiff purchased them was the same as when he sold them to his two corporations did not prove their value at the first sale and, further, that the lack of evidence as to the circumstances surrounding the second sale made the posture of the case not ripe for summary judgment:

> "Mr. Switzer: There is absolutely no evidence before this court, for purposes of this motion, as to what date the stock was valued by Mr. Kalmanovitz or anyone else with respect to its ultimate sale to General Brewing or S & P Corporation.
>
> "The evidence that the defendants have presented by way of affidavit simply shows that, in July of 1975 a series of financial transactions commenced in connection with Paul Kalmanovitz borrowing some $5

> million for the purchase of the stock; that ultimately, over a period of time, culminating in about November of 1976, it resulted in the sale of stock to S & P Corporation and General Brewing."
>
> "The Court: When did the sale take place?"
>
> "Mr. Switzer: There is no evidence."

(Hearing Transcript at 17).

Presented with this situation, the Court ordered discovery reopened "for the limited issue of what the circumstances were and when that stock was sold by Mr. Kalmanovitz" to his two companies. (Hearing Transcript at 35). Pursuant to theCourt's order, plaintiff's deposition was taken on October 4, 1979. Under oath, and for the first time in this litigation, plaintiff Kalmanovitz claimed that in buying the Falstaff Shares, he had not

actually purchased for his own account, but rather as an agent for General and S & P pursuant to a "plenary" authority vested in him by these controlled entities.

Defendants have renewed their motion for summary judgment, contending that the record, and the only record, is that Kalmanovitz bought the stock for $100 per share; that within a few months he sold it to the second purchasers at the same price; that nothing shows any fluctuation during the interim; and that the uncontradicted inference from this is that the value which plaintiff himself placed upon the stock was exactly that which he had originally paid for it. They urge the Court to disregard plaintiff's reversal of his new litigation position, and to ignore his most recent testimony, because it

contradicts earlier sworn statements by him and because it is unsupported by any available documentation. In response, plaintiff reiterates that genuine issues of material fact remain to be tried. Plaintiff's position seems to be that the conflict within his own testimony precludes summary judgment.

THE TRANSFER OF FALSTAFF SHARES

The "conflict" in the evidence in this case is self-generated, arising out of plaintiff's various versions of the transactions. However, some facts of the transactions are documented and are undisputed.

The contracts embodying the details of the issuance of Falstaff preferred shares, dated March 10, 1975, and April 28, 1975, were signed solely

by officers of Falstaff and plaintiff. Plaintiff negotiated and contracted only for himself, as a principal, not as an agent. No mention of General or S & P either direct or indirect, appears in either contract.

On April 14, 1975, City National Bank issued a $6 million demand note to plaintiff. The note contains no reference to General or S & P; plaintiff's is the only signature. The $5 million actually borrowed on the note to be used in the Falstaff purchase was deposited into plaintiff's checking account. While stock holdings of General and S & P, companies dominated by plaintiff, were used as collateral for the loan, nothing in the record indicates that plaintiff acted as agent or surrogate for the two

companies in borrowing the money, or that the companies were ultimately liable for payments on the loan. The loan was never listed as a liability in the financial statements or on the books of either company.

The 1975 financial statements of S & P and General reflect gradually increasing interests in Falstaff, listed under "assets". General's financial statement for March of that year valued the "Falstaff Account" at $1.5 million. The account increased to $2.6 million in April, and to $4.897 million in November. In S & P's financial statements, an asset labeled "Falstaff Brewing Co." was valued at $1 million in March 1975, and $2.1 million in May 1975.

The ownership of record of the

Falstaff preferred shares is indicated in a document prepared and signed by the secretary of Falstaff on October 4, 1979. Initial issue was to plaintiff on April 28, 1975. On December 28, 1976, all 100,000 shares were transferred 3,200 shares back to Falstaff.

PLAINTIFF'S TESTIMONY

In his November 1, 1977, deposition, plaintiff characterized his share of the $10 million purchase price as "temporary advance money," but stated that the funds used for the purchase were his, and that General and S & P eventually paid him back in full. Although he originally intended to retain twenty percent of the shares, he subsequently changed his mind and transferred all the shares to his two companies, fifty percent to each.

On April 3, 1978, plaintiff

testified in deposition that he borrowed the $5 million from City National Bank on his own initiative, and that he neither obtained nor required authorization from General. At his April 14, 1978 deposition, plaintiff was even more emphatic: "Just to keep the record straight, I borrowed the money and I paid interest, not General Brewing Company." (Plaintiff's Deposition, 4/4/78, p. 301).

At his deposition on October 4, 1979, however, plaintiff cast his activities in a new light. He stated that although he signed for the loan from City National, he did not consider the loan a personal obligation. He further testified that the obligation belonged to General and S & P, but admitted that the loan, therefore,

should have appeared as a liability on the books of the two companies. Contrary to his testimony of November 1, 1977, he stated in 1979 that he had never had any intention of retaining ownership of a portion of the Falstaff shares. When made aware of this discrepancy, he explained by saying that he might hae been upset at the earlier deposition.

Perhaps the clearest example of the conflict in plaintiff's accounts of his role in the purchase of Falstaff stock is the contradiction in two affidavits in opposition to summary judgment submitted by him to this Court for the August 24, 1979, and December 14, 1979, hearings.

The affidavit filed on July 30, 1979:

> "14. Because of the financial turn-around of Falstaff during

> the period from the spring of 1975 until the summer of 1976, in November of 1976 when the sale of my Falstaff preferred stock to General Brewing Corporation and S & P Corporation was effected, such shares had a value substantially greater than their value at the time I purchased them on April 28, 1975." (Emphasis added).

The suggestion made at that time was that plaintiff's efforts had accomplished an appreciation in the worth of the acquired shares.

But on December 3, 1979, plaintiff filed an affidavit swearing as follows:

> "5. After the initial acquisition of the stock, I continued to hold it in my individual name until such time as the two companies were in a position to have the stock transferred into their respective company names.
>
> "6. At no time did I have any personal ownership rights in said stock. My involvement was for the sole purpose of facilitating

transfer of the stock pursuant to the above mentioned agreements."

CONCLUSION

Throughout this litigation, plaintiff had consistently taken the position that he sold his Falstaff shares to General and S & P. He did not institute this lawsuit on behalf of these companies, nor does his complaint, filed three years ago, make any reference whatever to General or S & P. Not a single document or representation presented to this Court until recently suggested that plaintiff was acting on behalf of the two companies, or other than on his own account, in making the purchase of Falstaff shares. Nevertheless, he now contends that he was acting as an agent all along and that no second "sale"

ever occurred, because he was merely turning the stock over to the "true" owners. As a consequence, plaintiff asserts, it is immaterial whether the listed value of the shares when transferred to General and S & P was the same as when purchased from Falstaff; triable issues of fact remain as to what was the true value of the shares at the time of the original purchase.

Thus, this Court is presented with a situation in which a party attempts to manipulate the judicial process for his own self-interest by shifting his position in mid-litigation when it becomes apparent that some aspect of that position may jeopardize his case. A court has inherent authority to prevent suh abuse of the process. "Under the doctrine of judicial

estoppel a party and his privies who have knowingly and deliberately assumed a particular position are estopped from assuming an inconsistent position to the prejudice of the adverse party." In re Johnson, 518 F. 2d 246, 254 (10th. Cir. 1975), cert. den. 423 U.S. 893 (1975). Accord, Scarano v. Central Railroad Co. of New Jersey, 203 F. 2d 510, 513 (3rd Cir. 1953). More important than reliance by defendants herein on plaintiff's previous characterizations of his transactions is the necessity of protecting the integrity of judicial proceedings. "[Judicial estoppel] is, more properly, a rule which estops a party from ''playing fast and loose' with the courts." Selected Risks Insurance Co. v. Kobelinski, 421 F. Supp. 431, 434 (E.D. Pa. 1976).

Nor does plaintiff's contention that triable and disputed issues of

fact remain preclude judgment against him. This Court looks to the example of the Ninth Circuit in Radobenko v. Automated Equipment Corp., 521 F. 2d 540 (9th. Cir. 1975), where summary judgment for defendant was affirmed despite unresolved questions as to factual matters:

> "Thus, we are presented with the question of whether contradictory testimony of a plaintiff alone can be used by him to defeat a defendant's summary judgment motion where the only issue of fact results from the necessity of choosing between the plaintiff's two conflicting versions." Id. at 544. Accord, Perma Research and Development Co. v. Singer Co., 410 F. 2d 572 (2nd. Cir. 1969).

In the instant case, plaintiff's conflicting descriptions of his role in the purchase and transfer of the Falstaff shares do not present genuine issues of fact. Until the question of

the absence of loss or damage became prominent at the August 24, 1979 hearing, plaintiff had consistently maintained during three years of litigation that he purchased the shares from Falstaff and later resold them to his two companies. A party will be bound by the case he has sought to make; he will not be permitted loosely to abuse the judicial process he has invoked by shift of position when his strategical advantage appears better served thereby. To sanction such contrivance would invite deliberate fraud on the judicial forum. The Court simply will not hear a party who seeks thus to delay and divert.

Therefore, the Court deems the evidence to establish, without a countervailing genuine issue of material fact, that plaintiff purchased

the Falstaff shares for $100 per share, at a total cost of $10 million, and subsequently sold them to General and S & P for the identical amount, and that the value of the shares was at all times the same. Plaintiff thus suffered no loss, damage or economic injury in fact and has no cause of action, either for common law fraud, Vasquez v. Superior Court, 4 Cal. 3d 800, 94 Cal. Rptr. 796 (1971), or for a private suit under Section 10b of the 1934 Act. See Frigitemp Corporation v. Financial Dynamics Fund, 524 F. 2d 275, 281 (2d Cir. 1975); Herpich v. Wallace, 430 F. 2d 792, 810 (5th. Cir. 1970).

Accordingly, IT IS ORDERED that defendants' motion for summary judgment be, and the same hereby is, granted.

IT IS FURTHER ORDERED that plaintiff take nothing and that defendants recover their costs in this

action.

DATED: February 21, 1980.

CECIL F. POOLE

## STATUTES

15 U.S.C. §78J(b)

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any National Securities Exchange . . .

(b) to use or employ, in connection with the purchase or sale of any security registered on the National Securities Exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest of for the protection of investors.

17 C.F.R. 240.10b-5(b)

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails or of any facility of any National Securities Exchange.

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made not misleading, or

(c) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security.

February 21, 1980